UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 18 2015

OFFICE OF
GENERAL COUNSEL

To Environmental Integrity Project, Earthjustice, and Sierra Club
Re: Freedom of Information Act Request EPA-HQ-2013-008604 (EPA-HQ-APP-2013-000391), Final Response

This letter constitutes the final determination by the U.S. Environmental Protection Agency ("EPA" or "Agency") concerning the above-referenced information request submitted under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In your FOIA request, you sought the following information:

1. All plant-level loadings data related to the pollutant loadings and removals calculations in Section 10 of the Technical Development Document for the Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, including, but not limited to DCN SE03582, SE03583, SE03584, and SE03585.
2. 303(d) Impaired Waters Proximity Database (DCN SE03566)
3. 303(d) Impaired Waters National Data (DCN 5E03556)
4. 303(d) Impaired Waters Cause Summary (DCN SE03557)
5. Proximity Analysis Methodology Memorandum (DCN SE02151)
6. Appendix to Incremental Costs and Pollutant Removals for Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category Report (DCN SE03581.A1)
7. Performance data information cited in section 2, 3, and 5 of the ERG Memorandum dated April 23. 2012 (DCN SE03867)
8. Bromide sampling data that is referenced in Table 4-6 on page 4-25 of EPA's Steam Electric Power Generating Point Source Category: Final Detailed Study Report (Oct. 2009)

Robert Wood, EPA Director of Engineering and Analysis Division, sent you responses on August 5, August 9, August 30, and September 10, 2014. In these responses, the EPA partially denied your FOIA request under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). By letter dated October 11, 2013, you appealed the September 12 decision to initially deny the information withheld under Exemption 4 of the FOIA. The EPA responded to your appeal on December 13, 2013, and informed you that the EPA Office of General Counsel, General Law Office, already was required to complete confidentiality determination pursuant to EPA's CBI regulations under 40 C.F.R. Part 2, Subpart B.

Internet Address (URL) ● http://www.epa.gov
Recycled/Recyclable ● Printed with Vegetable Oil Based Inks on 100% Postconsumer, Process Chlorine Free Recycled Paper

After the December 13, 2013, appeal, the EPA initiated its CBI determination process by distilling all of the responsive CBI claims. This included first narrowing the 733 steam electric plants to approximately 380 plants. Even after significantly narrowing the number of facilities, the Agency's response would require an unprecedented amount of confidentiality determinations required for a single FOIA request. For some background information to understand the breadth of EPA's task of distilling the information claimed as CBI, the Agency received responses from 733 facilities of coal- and petroleum coke-fired plants, oil-fired, gas-fired, gas-combined cycle, and nuclear power plants in response to its *Questionnaire for the Steam Electric Power Generating Effluent Guidelines*.[1] In addition, the EPA also received information claimed as CBI from organizations and entities, such as vendors, that are not required to provide information to the Agency under section 308 of the Clean Water Act. 33 U.S.C. § 1318.

On January 30, 2014, the EPA Office of General Counsel provided you with a status report explaining that the Agency would require "at least seven months to notify the affected businesses, collect their substantiations, organize and process the voluminous amount of information, and issue the final confidentiality determinations." *See* January 30, 2014 Letter to FOIA Requester at 2.

By June 2014, the EPA furnished approximately 383 plants, the entities that submitted to the EPA the information responsive to your FOIA request ("submitters"), the opportunity to substantiate its claims on 188 unique *Questionnaire* questions (approximately 5,382 responses), under 40 C.F.R. § 2.204(d)(1)(i).

On June 30, two months short of its initial estimated completion, the EPA contacted you and informed you that it has diverted significant Agency resources to complete the confidentiality determinations. However, due to the voluminous amount of records to distill and competing priorities of a court ordered consent decree to complete the steam electric effluent guidelines, as you already are aware, the Agency required additional time to complete the confidentiality determinations. Accordingly, it estimated that the EPA would complete its confidentiality determinations by December 2014. Through its counsel, the Agency updated you of the status of its response deadline. Specifically, the EPA explained that it had encountered unforeseeable administrative delays outside the Agency's control and requested an additional six weeks to complete the confidentiality determinations and the CBI deducibility analysis, with a new deadline for the Agency's final confidentiality determination was February 18, 2015.[2]

After significant Agency resources has been expended to review and complete confidentiality determinations on information that only supports the proposed (and not final) Effluent Limitations and Guidelines for the Steam Electric Power Generating Category, EPA's Office of General Counsel issued a final determinations pursuant to EPA's regulations at 40 C.F.R. § 2.205(a)(2). The confidentiality determination covers approximately 122 plants for

---

[1] The EPA determined that the 733 facilities' responses to the Questionnaire encompassed approximately 2,277,099 records and 1,023,430 responses. The EPA further identified 218,287 responses were claimed as CBI. Records responsive to the FOIA request included responses to Parts A, B, C, D, E and F, whose combined total of CBI responses include 206,442 individual responses.

[2] The FOIA requesters granted the EPA an additional three day-extension and the Federal Offices in DC were closed due to inclement weather. Thus, the new deadline was February 18, 2015.

responses to questions within Parts A, B, C, D, E, and F of the Questionnaire on February 18, 2015. In addition, the EPA completed two confidentiality determinations for vendors, General Electric and Veolia Water Solutions & Technologies.

Trade Secrets and Confidential Business Information

While the FOIA and EPA's regulations impose upon the Agency a broad duty to disclose records, that duty is not without exception. Exemption 4 of the FOIA exempts from disclosure matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." EPA's regulations require the Agency to initially withhold documents that may be entitled to confidential treatment pending an opportunity for the submitter of the information to substantiate the confidentiality claim, and a final confidentiality determination by the appropriate legal office. 40 C.F.R. §§ 2.204(d)(l), 2.204(e), and 2.205(a)(2)(ii).

After careful review, I have now issued a final confidentiality determination for the requested information from plants. *See* Attachment 1: February 18, 2015, Final Confidentiality Determination for Plants EPA-HQ-2013-008604 (Appeal HQ-APP-2013-000391) ("Final Confidentiality Determination for Plants"). In the Final Confidentiality Determination for Plants, the EPA conclude that information in Appendices A and B met the requirements for confidential treatment under Exemption 4 of the FOIA because the record constituted commercial information, obtained from a "person," and the information was "confidential." *See* Appendices A and B of the Final Confidentiality Determination for Plants. In coming to this conclusion, I determined that a portion of the information claimed as CBI claims "confidential" because the information was obtained through either (1) a "voluntary" submission and the it is of a kind that would customarily not be released to the public, see Appendix A; or (2) a "required" submission and the release of this information would cause significant harm to the submitter's competitive position, see Appendix B. *See National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974) and *Critical Mass Energy Project v. Nuclear Regulatory Commission,* 975 F.2d 871, 879 (D.C. Cir. 1992).

At the same time, I determined that a subset of the information in Appendix C was not CBI because the information was not "confidential." *See* Appendix C of the Final Confidentiality Determination. Pursuant to 40 C.F.R. § 2.205(f), the Agency will release this information if the submitters does not seek judicial review within 10 working days after receipt of the final confidentiality determination. Therefore, you will receive all non-exempt information immediately after this period if the Agency does not receive any notice of judicial review of its adverse confidentiality determination.

I have also determined that vendor information pertaining to equipment installation and operation and maintenance costs is entitled to confidential treatment. The EPA "voluntarily" obtained this information from the vendors during the proposed Steam Electric Effluent Guidelines rulemaking, and this type of information is not customarily disclosed. The two confidentiality determinations are attached to this letter. *See* Attachment 2: September 4, 2014, and February 18, 2015, Final Confidentiality Determinations for Vendors EPA-HQ-2013-008604 (Appeal HQ-APP-2013-000391) ("Final Confidentiality Determinations for Vendors").

EPA's Deducibility Analysis on Waived CBI

The EPA recognizes the possibility that non-CBI, specifically information with waived CBI claims, could be used by the public to deduce or back calculate information that has been found to be CBI and is therefore entitled to protection under FOIA Exemption 4. CBI may be deduced from aggregated data (e.g., average values) when those aggregated data are: (1) based on both CBI and non-CBI data points, (2) the non-CBI data points are presented publicly, and (3) there are insufficient CBI values to prevent back calculation of their values. The EPA invested significant resources to conduct a deducibility analysis to identify any CBI that is or would be vulnerable to this type of reverse engineering if the Agency released the non-CBI.

I have attached a copy of the Agency's methodology, entitled: "Rationale for Handling Company Ownership Changes in CBI Deducibility Analysis to Prepare Responses to FOIA Request EPA-HQ-2013-008604" ("Deducibility Analysis"). *See* Attachment 3. Based on the information collected during EPA's confidentiality determination process, the memorandum describes the methodology the EPA applied to determine whether any waived CBI may be CBI-deducible information. For certain information, the EPA determined that the release of CBI-deducible information would reveal CBI; thereby causing substantial competitive harm to the companies submitting the CBI. Accordingly, based on the methodology explained in the Deducibility Analysis, the Agency withheld the information listed in the Excel Spreadsheet "Final CBI Determination Deducibility Analysis." *See* Attachment 4.

Information to be Released to FOIA Requesters

Subject to 40 C.F.R. § 2.205(f), the Agency will release this information if the submitters does not seek judicial review within 10 working days after receipt of the final confidentiality determination. If the Agency has not received judicial notice after this time period, the EPA will release the following non-exempt information:

The appendices to the *Incremental Costs and Pollutant Removals for the Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category* report contain the plant-level input tables used in the costs and loadings model, as well as the plant-level costs and loadings output tables. The following are titles for the 48 tables contained in the appendices.

- Table A-1. Cost Input Table for Flue Gas Desulfurization (FGD) Wastewater
- Table A-2. Cost Input Table for Fly Ash
- Table A-3. Cost Input Table for Bottom Ash
- Table A-4. Cost Input Table for Landfill Leachate
- Table A-5. Loadings Input Table for Flue Gas Desulfurization (FGD) Wastewater
- Table A-6. Loadings Input Table for Ash Transport Water
- Table A-7. Loadings Input Table for Landfill Leachate
- Table A-8. High Flow Flue Gas Desulfurization (FGD) Input Table

- Table A-9. Flue Gas Desulfurization (FGD) Chemical Precipitation Treatment In Place Input Table
- Table A-10. Heat Exchanger Cost Input Table Used for Flue Gas Desulfurization (FGD) Biological Treatment Module
- Table A-11. Surface Impoundment Input Table
- Table A-12. Plant-Level Costs to Implement Surface Impoundment Best Management Practices (BMPs)
- Table A-13. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater with a One-Stage Chemical Precipitation System Based on All Units Installing the Technology Basis
- Table A-14. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater with a One-Stage Chemical Precipitation System Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-15. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater with a Biological Treatment System Based on All Units Installing the Technology Basis
- Table A-16. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater with a Biological Treatment System Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-17. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater with a Vapor-Compression Evaporation System Based on All Units Installing the Technology Basis
- Table A-18. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater with a Vapor Compression Evaporation System Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-19. Plant-Level Costs to Convert to Dry Fly Ash Handling Based on All Units Installing the Technology Basis
- Table A-20. Plant-Level Costs to Convert to Dry Fly Ash Handling Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-21. Plant-Level Costs to Convert to a Mechanical Drag System for Bottom Ash Handling Based on All Units Installing the Technology Basis
- Table A-22. Plant-Level Costs to Convert to a Remote Mechanical Drag System for Bottom Ash Handling Based on All Units Installing the Technology Basis
- Table A-23. Plant-Level Costs to Convert to Dry or Closed-Loop Bottom Ash Handling Based on All Units Installing the Technology Basis
- Table A-24. Plant-Level Costs to Convert to Dry or Closed-Loop Bottom Ash Handling Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-25. Combustion Residual Landfill Leachate Cost Matrix for Regulatory Option 4
- Table A-26. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater and Combustion Residual Leachate with a One-Stage Chemical Precipitation System Based on All Units Installing the Technology Basis

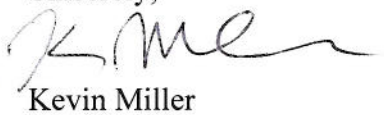
- Table A-27. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater and Combustion Residual Leachate with a One-Stage Chemical Precipitation System Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-28. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater and Combustion Residual Leachate with a Biological Treatment System Based on All Units Installing the Technology Basis
- Table A-29. Plant-Level Costs to Treat FGD Wastewater and Combustion Residual Leachate with a Biological Treatment System Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-30. Plant-Level Costs to Treat Flue Gas Desulfurization (FGD) Wastewater and Combustion Residual Leachate for Regulatory Option 4 Based on All Units Installing the Technology Basis
- Table A-31. Plant-Level Costs to Treat FGD Wastewater and Combustion Residual Leachate from Regulatory Option 4 Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-32. Plant-Level Baseline Loadings for Flue Gas Desulfurization Wastewater
- Table A-33. Plant-Level Loadings for Chemical Precipitation Technology Option for the Treatment of Flue Gas Desulfurization Wastewater Based on All Units Installing the Technology Basis
- Table A-34. Plant-Level Loadings for Chemical Precipitation Technology Option for the Treatment of Flue Gas Desulfurization Wastewater Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-35. Plant-Level Loadings for the Biological Treatment Technology Option for the Treatment of Flue Gas Desulfurization Wastewater Based on All Units Installing the Technology Basis
- Table A-36. Plant-Level Loadings for the Biological Treatment Technology Option for the Treatment of Flue Gas Desulfurization Wastewater Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-37. Plant-Level Loadings for the Vapor-Compression Evaporation Technology Option for the Treatment of Flue Gas Desulfurization Wastewater Based on All Units Installing the Technology Basis
- Table A-38. Plant-Level Loadings for the Vapor-Compression Evaporation Technology Option for the Treatment of Flue Gas Desulfurization Wastewater Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-39. Plant-Level Baseline Ash Transport Water Loadings
- Table A-40. Plant-Level Technology Option Ash Transport Water Loadings Based on All Units Installing the Technology Basis
- Table A-41. Plant-Level Technology Option Ash Transport Water Loadings Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-42. Plant-Level Baseline Loadings for Landfill Leachate
- Table A-43. Plant-Level Loadings for Chemical Precipitation Technology Option for the Treatment of Landfill Leachate Based on All Units Installing the Technology Option

- Table A-44. Plant-Level Loadings for Chemical Precipitation Technology Option for the Treatment of Landfill Leachate Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-45. Plant-Level Loadings for Biological Treatment Technology Option for the Treatment of Landfill Leachate Based on All Units Installing the Technology Basis
- Table A-46. Plant-Level Loadings for Biological Treatment Technology Option for the Treatment of Landfill Leachate Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis
- Table A-47. Plant-Level Loadings for the Treatment of Flue Gas Desulfurization Wastewater and Landfill Leachate for Regulatory Option 4 Based on All Units Installing the Technology Basis
- Table A-48. Plant-Level Loadings for the Treatment of Flue Gas Desulfurization Wastewater and Landfill Leachate for Regulatory Option 4 Based on Oil-Fired Units and Units 50 MW or Less Not Installing Technology Basis

Conclusion

For these reasons, I have determined that Appendices A and B and the vendor equipment installation and operation and maintenance costs information are entitled confidential treatment and should be withheld under Exemption 4 of the FOIA. I have also determined that the information in Appendix C is not entitled to confidential treatment, and the non-exempt tables will release the information after the regulatory period to seek judicial review has expired, consistent to 40 C.F.R. § 2.205(f). Furthermore, I have determined that CBI-deducible information in Attachment 4 may not be released because that information could be used to reverse engineer (back calculate) CBI, which is protected under Exemption 4.

Sincerely,



Kevin Miller
Assistant General Counsel
General Law Office

Encl.

Attachment 1: Final Confidentiality Determination for Plants
Attachment 2: Final Confidentiality Determination for Vendors
Attachment 3: Deducibility Analysis
Attachment 4: Excel Spreadsheet Final CBI Determination Deducibility Analysis

cc: Robert K. Wood, Director of the Engineering & Analysis Division, Office of Water
Jan Matuszko, Engineering & Analysis Division, Office of Water